No. 85-1880

Supreme Court, U.S.
FILED
MAY 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MORENO L. KEPLINGER and JAMES B. PLANK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS D. DECKER*
MARY KATHARINE RYAN
RICHARD H. McLEESE
THOMAS D. DECKER
& ASSOCIATES, LTD.
135 S. LaSalle Street, Suite 853
Chicago, Illinois 60603
(312) 263-4180
Counsel for Petitioner Keplinger

HARVEY M. SILETS*
SILETS & MARTIN
140 S. Dearborn Street, Suite 1510
Chicago, Illinois 60603
(312) 263-5800
Counsel for Petitioner Plank

May 13, 1986

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Having spent hundreds of hours in meetings with company officials (including the Petitioners), in efforts to answer the questions of an investigating federal agency, did company lawyers violate a branch of the attorney-client privilege, the joint defense doctrine, by their trial disclosures of communications and information received from the officer-defendants?

2. Did the testimony by company lawyers violate the attorney-client privilege because an implied relation or a fiduciary duty not to disclose communications was created because (a) the lawyers rendered legal advice to the Petitioners and other company employees, (b) the lawyers did not tell the Petitioners or other officials they represented only the company, and (c) the Petitioners and other officials reasonably believed they were represented personally by the lawyers?

3. Should the conviction of the Petitioner Keplinger be reversed as to the Naprosyn reports because there was no evidence he knew of or participated in the falsifications which were proven against others, thus violating the Due Process requirement of proof beyond a reasonable doubt?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND RULE INVOLVED	2
STATEMENT OF THE CASE	3
The Attorney-Client Issue	4
The Sufficiency Of The Naprosyn Evidence As To The Petitioner Keplinger	12
REASONS FOR GRANTING THE WRIT:	
I.	
CERTIORARI SHOULD BE GRANTED BECAUSE THE ATTORNEYS' TESTIMONY INFRINGED THE PETITIONERS' SIXTH AMENDMENT RIGHT TO COUNSEL AND THE PROTECTION AGAINST DISCLOSURES AFFORDED BY THE JOINT DEFENSE DOCTRINE, A BRANCH OF THE ATTORNEY-CLIENT PRIVILEGE	13
II.	
THE WRIT SHOULD BE GRANTED BECAUSE THE ATTORNEYS' TESTIMONY VIOLATED THEIR FIDUCIARY DUTIES AND THE IMPLIED ATTORNEY-CLIENT RELATIONSHIPS WHICH EXISTED BETWEEN THEM AND THE PETITIONERS	21

III.

THE WRIT SHOULD BE GRANTED BECAUSE THE CONVICTION OF THE PETITIONER KEPLINGER AS TO THE NAPROSYN STUDY VIOLATED THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases PAGE

Continental Oil Co. v. United States, 320 F.2d 347 (9th Cir. 1964) 13, 14

E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D. Tex. 1969) 24, 25

Fisher v. United States, 425 U.S. 391 (1976) .. 13

Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) 14, 15

In re Grand Jury Proceedings (Jackier), 434 F. Supp. 648 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978) 23, 25

In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985) . 13, 14

Jackson v. Virginia, 443 U.S. 307 (1979) 26

Trammel v. United States, 445 U.S. 48 (1980) ... 22

United States v. Calandra, 706 F.2d 225 (7th Cir. 1983) 4, 5, 9, 16

United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985) 1, 4, 16

United States v. McPartlin, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979) 14, 15

United States v. Schlegel, 313 F. Supp. 177 (D. Neb. 1970) 19, 20

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 18

Upjohn Co. v. United States, 449 U.S. 383 (1981) . 21, 22

Weatherford v. Bursey, 429 U.S. 545 (1977) ... 13

Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) 22, 23, 24

Other Authorities

United States Constitution, Amendment V 2

United States Constitution, Amendment VI ... 3

28 U.S.C. § 1254(1) 2

Rule 501, Federal Rules of Evidence 3

Proposed Rule 503(a)(1), Federal Rules of Evidence (1972) 23

Proposed Rule 503(b)(3), Federal Rules of Evidence (1972) 14

1 K. Brickey, Corporate Criminal Liability ch. 3 (1984) 15

J. Waltz, The New Federal Rules of Evidence 47 (2d ed. 1975) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MORENO L. KEPLINGER and JAMES B. PLANK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion for the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 29, 1985, affirming the petitioners' convictions. The Court of Appeals denied a timely petition for rehearing on February 21, 1986. *See* Appendix hereto, p. 46. On April 17, 1986, a Justice of this Court extended the time for filing a petition for a writ of certiorari to and including May 13, 1986. *See* App. 47.

OPINION BELOW

The opinion of the Court of Appeals is reported at 776 F.2d 678 (7th Cir. 1985), and is reproduced at App. 1. The written ruling by the District Court as to the defendants'

motion to suppress evidence because of violations of the attorney-client privilege appears at App. 48. The oral argument during trial concerning, and the ruling of the District Court denying, the defendants' motion that the joint defense doctrine barred the testimony of two attorneys appear at App. 59-85.

JURISDICTION

On October 29, 1985, the Court of Appeals entered judgment affirming the Petitioners' convictions. A timely petition for rehearing was denied on February 21, 1986. App. 46. By order dated April 17, 1986, this Court extended the time within which to file the petition for a writ of certiorari to and including May 13, 1986. App. 47. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 501, Federal Rules of Evidence

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

The Petitioners Moreno L. Keplinger and James B. Plank, together with two other defendants,[1] were employees of a corporation, Industrial Bio-Test (IBT). The company was a contract research laboratory which con-

[1] The defendant Joseph C. Calandra was granted a severance during the trial because of medical problems. Tr. 8795. The defendant Paul L. Wright is not a party to this writ.

ducted animal toxicity studies of various drugs, pesticides and chemicals for manufacturers in order to determine their safety and effectiveness. The Petitioner Keplinger was IBT's Manager of Toxicology; in the pertinent period Plank was a Group Leader of the Rat and Dog Toxicology Department and later an assistant to Keplinger. *United States v. Keplinger*, 776 F.2d 678, 683 (7th Cir. 1985), App. 2 hereto.

The defendants were indicted in the United States District Court for the Northern District of Illinois for alleged mail fraud, wire fraud, and false statements to the United States Food and Drug Administration (FDA) in connection with four toxicological studies conducted in 1971 and 1972. *See* R. 1. As to two of the studies, which concerned the products Nemacur and Sencor, the Petitioners were acquitted. App. 2 n.2; *see* Rec. 1. After a trial which lasted more than six months, they were convicted under various counts dealing with two commercial products, TCC and Naprosyn. *Id.*; R. 480-82.

The Attorney-Client Issue

The litigation followed an FDA investigation begun in April of 1976. At that time IBT's President, Dr. Calandra, turned to Ted Mooney, the General Counsel of IBT's parent, Nalco, Inc. Mooney brought in Merrill Thompson, an attorney with a law firm, to assist. *United States v. Calandra*, 706 F.2d 225, 226 (7th Cir. 1983) (dismissed for lack of jurisdiction over defendants' interlocutory appeal), App. 54. Both attorneys previously represented IBT as well as Calandra personally, but had not billed Calandra for personal services. Tr. 181-82, 622-30, 650-51.

Dr. Calandra regarded the FDA investigation as a threat to him personally as well as IBT. Hence, when he got advice from Mooney, he had every reason to believe Mooney was providing personal advice. *See* Tr. 671-72.

Mooney told Calandra that Thompson would assist and advise Calandra and other IBT employees. Tr. 185-86, 276-78, 627. Dr. Calandra understood Mooney's statements to mean that Thompson would be representing IBT as well as the company's employees in their individual capacities. Tr. 627-31, 677. In turn, Dr. Calandra instructed the Petitioners and other employees that Thompson was their lawyer and they should cooperate with him. Tr. 678, 728, 779-81. The Petitioner Keplinger believed that Thompson and Fred Current were his personal attorneys, Tr. 752-71, 14967, and that Thompson would respect the confidentiality of Keplinger's communications. Tr. 763-64. The court below adopted evidence that Thompson told the Petitioner Plank that he was not Plank's lawyer. App. 35. Plank testified, however, that he also regarded Fred Current as his personal attorney, Tr. 803-04, and the lawyer testified Plank could have assumed he was receiving "personal legal advice." Tr. 131-33.

Current, a corporate attorney with Nalco, replaced Mooney in the fall of 1976 and worked with IBT and its employees. *United States v. Calandra*, 702 F.2d at 226, App. 55. Neither Thompson nor Current had experience in the evaluation of toxicological tests, grand jury investigations, litigation, or the criminal law. *See* Tr. 28, 58-60, 243, 271, 275, 295-97, 11133, 11349-51.

Thompson and Current worked with Dr. Calandra, Dr. Keplinger, Mr. Plank, and other top officers of IBT. The principal task of the lawyers and the IBT officials was the preparation of responses to the FDA's questions about the company's studies. From Thompson's point of view this process also involved the investigation of both the available data and IBT personnel. Tr. 515-17.

In November of 1976 IBT sent a written explanation of the Naprosyn study to the FDA. G. Ex. VI-B-8.

In December of 1976 IBT submitted its written explanation of the TCC study. G. Ex. II-B-11. These explanations completed the work begun six months earlier. They became the principal bases for the indictment.

During this period Thompson met about 75 times with the defendants and other key IBT officials, Tr. 189, and billed IBT for about 200 hours' work a month. *See* Tr. 11139. (He was eventually to bill about 2600 hours to the project, Tr. 11445, in addition to time logged by associates of his. Tr. 11490.)

The purpose of the meetings, Thompson said, was to determine "how to deal with the FDA in the pending legal proceeding." Tr. 497. During these meetings Thompson counseled the defendants Calandra, Keplinger and Plank on how to respond to the questions being raised both by IBT's clients and the FDA. Tr. 72-74. In turn, the defendants looked to Thompson for advice on these matters. *See, e.g.*, Tr. 94-96, 378, 500-01, 636-37, 729-30, 741-42, 784-87.

A principal issue in the case was whether the attorneys personally represented the defendants, as the defendants contended by motion. *See* App. 32. That the lawyers actually performed legal services for the defendants was admitted. Thompson testified that IBT officials acted on the advice of counsel, himself and Nalco's corporate lawyers. Tr. 265-67. He considered his discussions with IBT officials about criminal prosecution as, in part, the rendition of legal advice to them. Tr. 418-22. An associate of Thompson represented Dr. Keplinger at a deposition in a civil case related to the FDA allegations. Tr. 339-40, 734-36. Thompson billed for representation of IBT employees. Tr. 369. And he admitted that IBT officials acted upon his advice in refusing an FDA request for access to certain records. Tr. 265-67. Thompson appeared at an FDA hear-

ing with Dr. Calandra and sat silently as he was referred to repeatedly as Calandra's lawyer. *See* Calandra Ex. 7 of 3/24/83, at 5, 6, 23, 26-27, 76-78; Tr. 255-69.

Thompson also advised employees how they could explain or justify certain documents. Tr. 299-301. He edited materials generated by IBT employees and prepared written submissions to the FDA for the signatures of Calandra, Keplinger, Plank, and other IBT employees. *Id.* He reviewed "vast" numbers of documents. Tr. 11947.

Thompson advised IBT employees about legal principles and guidelines and prepared and redrafted letters to Sponsors of IBT studies. Tr. 378-79, 398-404; Calandra Ex. 7 of 3/24/83. Thompson said his job was to counsel the IBT employees "on the presentation of their position, helping them with the preparation, formulation of disclosures [and] responses to agency inquiries." Tr. 494. He informed them about "legal principles and guidelines," and gave them "advice on how the responses [to FDA inquiries] should be formulated or presented." Tr. 378, 500-01.

In September of 1976 Thompson commissioned and received a legal memorandum from a lawyer at his firm on the subject of criminal liability under the false statements statute, 18 U.S.C. § 1001. Tr. 414-18. He knew there might be criminal prosecutions and discussed the possibility hundreds of times with the defendants. Tr. 418-26. In a letter to Dr. Calandra dated September 29, 1976, an FDA official confirmed that criminal charges were possible: "We find . . . that your reports contain inaccurate and false data." Calandra Hrg. Ex. 4 of 3/24/83, at 1.

In the course of the 2600 hours Thompson devoted to the investigation, he did not explore with IBT's employees the nature of his legal representation, tell them he represented only IBT, or advise them (save for Plank) he would not regard their communications as confidential. *See* p. 5

supra; Tr. 198-201, 357- 59, 366, 426-27, 488, 495, 504-06, 512-13, 526-27, 631, 663-64, 741, 779-89, 11348. Indeed, he said, he avoided the subject of confidentiality. Tr. 11347. Despite the threat of criminal prosecution, Thompson said it never occurred to him that the company officials should retain their own lawyers. Tr. 359-60. Similarly, Current did not discuss the scope of his representation. Tr. 65-66. He testified, however, that he and Thompson rendered legal advice to the defendants. Tr. 72-73.

In preparing the TCC report, which was submitted to the FDA in December of 1976, conflicts arose between Thompson and Dr. Calandra about highly scientific matters, Current said. Tr. 68; *and see* Tr. 655. Current also testified Dr. Calandra felt Thompson no longer could fairly and accurately represent IBT. Tr. 50. At the last minute, Thompson declined to attend a meeting between IBT and FDA officials on December 14, 1976, citing concerns he later admitted were ill-founded. *See* Tr. 228-30, 659, 765, 799-800. Thompson did not inform IBT's Board of his decision not to attend the meeting or that he was having difficulties with IBT officers. Tr. 11588-89. Instead, he sent an associate to the meeting who was unfamiliar with the studies. Tr. 228-31.

By this time Thompson recognized his relationship with Dr. Calandra was strained and adversarial. Tr. 210-12, 11367; App. 34. He felt he had become part of the problem rather than one who might contribute to a solution and realized he had failed to gain the confidence and cooperation of IBT's officers. Tr. 11538. (Dr. Keplinger felt Thompson did not understand scientific matters or IBT's operations. Tr. 14739-40.) Thompson learned that Dr. Calandra advocated replacing him with another lawyer. Tr. 11380-81.

By the end of 1977, a year before the FDA referred the investigation to the Department of Justice, the defen-

dants had left the employ of IBT. *See United States v. Calandra,* 706 F.2d at 226-27, App. 55.

In 1980, in return for disclosures about their participation in the FDA investigation, the attorneys Thompson and Current were granted "letter" immunity by the United States Attorney, thus bypassing the district court and a possible adjudication of attorney-client issues. (The defendants were unaware that the lawyers had received immunity.) *Id.* at 227, App. 56.

Thompson and Current then disclosed to the government communications they had with the Petitioners and other IBT employees, as well as information about the Petitioners' conduct and their participation in the preparation of reports to the FDA. *Id.*

Before trial the defendants moved to suppress testimony and materials allegedly obtained in violation of the attorney-client privilege and the joint defense doctrine. *See* App. 32; R. 99, 100, 117. They objected to the government's calling Thompson and Current as trial witnesses. After a hearing the District Court found that attorney-client relationships did not exist between the lawyers and the defendants, crediting the lawyers' testimony that they represented only IBT, and denied the motion to suppress. *See* App. 48. As the Court of Appeals found, and the defendants did not contest, no express agreement for individual representation existed, nor did any defendant ask Thompson or Current for individual representation. App. 34. The court also found the defendants did not ask questions relating to personal representation and they made no incriminating statements. *Id.* And, the court held, what they said was not in confidence because they knew the information they communicated to the lawyers was to be disclosed to the FDA and most of the defendants' statements were made in the presence of third parties. *Id.* at 34-35.

The District Court did not rule on the defendants' motion that permitting the attorneys' testimony would infringe the joint defense doctrine. At the trial, before the lawyers testified, the issue of the joint defense doctrine was argued in connection with the defense motion to bar the attorneys' testimony. For the reasons described below, pp. 20-21, the Trial Judge denied the motion.

The lawyers' testimony, which extended over six trial days, concluded the government's case in chief. *See* Tr. 11128-11721. Despite the fact that the lawyers' work continued for many months after the TCC and Naprosyn explanations were submitted to the FDA, *see* pp. 5-6 *supra*, neither Thompson nor Current identified a single falsehood or inaccuracy in these critical documents. For the Court's convenience we have appended a number of summaries of the attorneys' testimony, together with occasional commentary. App. 86. Several examples of the testimony, however, provide the flavor.

Merrill Thompson complained that he had wanted to talk with the defendant Keplinger during the week of February 21, 1977, but was unable to do so. Tr. 11326. Thompson admitted on cross-examination that he knew Keplinger was on vacation that week. Tr. 11413.

The defendant Wright attended a conference with FDA officials on October 26, 1976. A participant in the meeting testified the agency officials were extraordinarily hostile. The witness said it was the most hostile experience he had since he engaged in combat duty as an infantryman in Europe during World War II. Tr. 12857-58. After this experience, Thompson testified, Dr. Wright allegedly made the ambiguous remark that he felt "there was nothing we could do to make the studies acceptable to the agency." At this point in time Thompson felt the FDA was acting arbitrarily, Tr. 11489, and he wrote letters that were critical of its actions and attitudes toward IBT. Tr. 302-07.

Thompson also testified that in early December of 1976 he asked the defendant Keplinger if he had drafts of the TCC study. Keplinger said he did and gave them to Thompson, making the alleged comment, "I guess I should have wished that they—that those were destroyed." Tr. 11226. While the alleged comment could have meant a number of things, given the strained relationships between the lawyers and IBT officials at that point, and the latter's belief that Thompson was not competent, a prosecutor in closing argument urged the jury to infer that Dr. Keplinger thereby revealed his desire to conceal the contents of the drafts from Thompson. Tr. 17123-24. (The prosecutor did not explain why Keplinger simply did not destroy the drafts or deny they existed if those were his feelings.)

Finally, improper or prejudicially suggestive questions to the lawyers led to an extraordinary number of objections and sidebar conferences. The Court repeatedly granted motions to strike,[2] and numerous inproper or suggestive questions were withdrawn, or objections were sustained[3] which were, of course, heard by the jurors.

---

[2] *E.g.*, Tr. 11212, 11287, 11302, 11305, 11313, 11411, 11444, 11539-40, 11612-13 (*and see* 11602). The rulings came after Thompson testified Calandra gave him an explanation different from one which was provided by someone whose name he didn't recall; after the witness evidently was about to testify about a study which was never planned; after Thompson called someone an "investigator" without support; after Thompson launched into a complaint about receiving materials in an untimely fashion; after he repeatedly volunteered information not sought by questions; and after he related the hearsay that an IBT employee said a report of Plank's was a "construct job." *Id.*

[3] Tr. 11129, 11174-92, 11197, 11198, 11222, 11224, 11254, 11265, 11270, 11272, 11279-84, 11312, 11326, 11559, 11571-78, 11612-13. Thompson was asked who, other than himself, had been granted a waiver by IBT of the attorney-client privilege; the prosecutors sought to elicit testimony about conversations when Thompson did not recall the identity of the declarants, advancing the theory that since the defendants were present at some or all of the meetings,

(Footnote continued on following page)

The Sufficiency Of The Naprosyn Evidence As To The Petitioner Keplinger

Only the Petitioner Keplinger advances the argument that the evidence was insufficient to support his conviction relating to the Naprosyn study, which was the subject of Counts I, III, and VII of the indictment. *See* R. 1.

The Court of Appeals held that in failing to "look into" the matter of missing blood and urine data from the Naprosyn study, "in combination with other evidence [not identified]," Dr. Keplinger was proven guilty. App. 15.

Dr. Keplinger did not work on the study report or the separate post-study preparation of Appendix II, the two documents which the jury found contained fabricated data in the Naprosyn study. App. 13-15; Tr. 14699-14701.

The government sought by a single piece of evidence to link Dr. Keplinger with the study. A pathologist employed by IBT, Donovan Gordon, testified he and an IBT veterinarian, Dr. Vondruska, met with Dr. Keplinger in early 1972, some six or seven months after the Naprosyn study was completed and the report had been sent to the client. Tr. 7719. According to Gordon, Vondruska told Keplinger that the final Naprosyn blood and urine data could not be found. Gordon testified for the prosecution that Keplinger said he would "look into it" but, *to Gordon's knowledge*, never did. Tr. 7720. On cross-examination, though, Gordon admitted his testimony had been false. He had no knowledge whatsoever of Keplinger's actions. Tr. 8583.

---

[3] *continued*
their silence when statements were made would be admissions; Thompson testified about what non-parties said about various matters; leading and suggestive questions were asked; Thompson suggested that Dr. Calandra improperly wanted to "alter" a document using a stamp which would have identified the document as a draft subject to change; a prosecutor wanted Thompson to explain why he decided he couldn't attend with Dr. Calandra a meeting with FDA personnel; Thompson suggested that IBT's laboratory practices were atypical. *Id.*.

The only other evidence on the matter came from Dr. Keplinger. Testifying at the trial in 1983, he said he did not recall the 1972 conversation related by Gordon. Keplinger testified, however, that it was his practice to maintain a list of any problems that arose at the laboratory and to cross off the problems as they were solved. He recalled no unresolved problems from 1972. Tr. 14701-02.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ATTORNEYS' TESTIMONY INFRINGED THE PETITIONERS' SIXTH AMENDMENT RIGHT TO COUNSEL AND THE PROTECTION AGAINST DISCLOSURES AFFORDED BY THE JOINT DEFENSE DOCTRINE, A BRANCH OF THE ATTORNEY-CLIENT PRIVILEGE.

In this portion of our attorney-client argument, we assume for argument's sake that the Petitioners were not represented personally by Messrs. Thompson and Current when the latter acquired the information about which they testified at the trial.

The decision of the Court of Appeals is incompatible with the recognition afforded by this Court, *e.g.*, *Weatherford v. Bursey*, 429 U.S. 545 (1977); and *Fisher v. United States*, 425 U.S. 391, 403 (1976), and by the Seventh and Ninth Circuits in the decisions cited below, of the importance of shielding confidential, litigation-related communications from adversaries, thus effectuating the attorney-client privilege and the constitutional right to counsel.

The Sixth Amendment right to counsel and the attorney-client privilege interact in criminal cases to protect similar interests. *E.g.*, *In re Sealed Case*, 754 F.2d 395, 403 (D.C. Cir. 1985) (concurring opinion); *Continental Oil Co. v.*

United States, 320 F.2d 347, 350 (9th Cir. 1964). A component of the privilege is the joint defense doctrine, which applies though a person is not represented or speaks in the absence of his lawyer. *See* Proposed Federal Rule of Evidence 503(b)(3) (1972) (privilege protects communications to "a lawyer representing another in a matter of common interest.").[4] *See United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979), in which a defendant, in the absence of his lawyer, made disclosures to a codefendant's investigator.

Incursions upon client-lawyer deliberations fortunately have been few.[5] When lawyers' work product or testimony has been compelled, it has been for the understandable reason that the clients were shown to have perverted the relationship. Because the clients used the lawyers in order to perpetrate crimes or fraud, the attorney-client privilege was vitiated and the lawyers could be compelled to testify or produce documents. *See, e.g.*, the discussion in *In re Sealed Case*, *supra*. (In the instant case, the Trial Judge did not find that the defendants deprived themselves of the privilege by using the lawyers in a fraudulent scheme.)

Absent a showing of the crime-fraud exception to the attorney-client privilege, courts until the instant decision uniformly barred efforts to invade or exploit communications between citizens with common interests and/or their lawyers. *See United States v. McPartlin*, *supra*; *Continental Oil Co. v. United States*, *supra*; *Hunydee v. United*

---

[4] And see note 7, p. 23 *infra*.

[5] *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), ruled that memoranda exchanged between counsel for two oil companies and their employees could not be obtained by subpoena despite the fact that no indictment had been obtained. In its analysis of the attorney-client privilege in this context, the court cited two state court decisions, but no federal cases. *Id.* at 349-50.

States, 355 F.2d 183 (9th Cir. 1965). In *McPartlin* it did not matter that the communications sought to be admitted were between a defendant whose interests diverged from those of an investigator working for a codefendant in a criminal case. (The communications would have tended to exculpate the codefendant and incriminate the defendant.) As *McPartlin* explained, in *Hunydee* the interests of the codefendants also were directly adverse. There, one defendant believed she would not be prosecuted if the other pleaded guilty. Yet, despite this diversity of interests, the joint defense doctrine applied to statements that were made during a joint conference regarding a possible guilty plea by the other defendant. 595 F.2d at 1336 n.15.

There were two prongs to the Seventh Circuit's analysis denying to the Petitioners the protection of the joint defense doctrine. The court expressed "serious doubts whether IBT and the individual defendants really shared a 'common purpose' in the sense necessary to support application of the joint defense doctrine." App. 37. Second, the court adopted the trial court's finding that the Petitioners' communications were not made in confidence. There is no support for either view.

A.

At the outset, IBT's interest was indistinguishable legally from its employees': If the latter sinned, IBT was subject to prosecution. *See generally* 1 K. Brickey, *Corporate Criminal Liability* ch. 3 (1984).

The first point is also governed by *United States v. McPartlin*, which expressly rejected the notion of a "compatible defense requirement," 595 F.2d at 1337 & n.16, as a condition of applying the joint defense doctrine. Indeed, *McPartlin* appears to have been the only decision, until now, in which a litigant has advanced so revolutionary a challenge to the doctrine. The reasons seem clear enough.

Co-parties in investigations or litigation invariably have "incompatible" interests in the sense that the degree of liability varies among them, as does the quantum of the opponents' proof. In such circumstances, as well as the perhaps hypothetical situation in which co-parties have precisely equal interests or exposure, there is powerful incentive to bargain with the adversary if the secrecy of attorney-client communications is not sacrosanct.

A party anxious to strike a bargain need not, if the instant decision is correct, be able to prove the crime-fraud exception. The party need only demonstrate that he or it (or their lawyers) can divulge information that is harmful to the co-parties or otherwise helpful to the adversary.

The doctrine of *Keplinger* extends to civil litigation. What plaintiff, say, would not trade a dismissal against one of five solvent defendants for information from the defendant's lawyers as to the strengths and weaknesses of the defense case, and for the lawyers' trial testimony against their former colleagues? The stakes are equally high in criminal litigation. Here, by waiving the attorney-client privilege, *United States v. Calandra*, 706 F.2d 225, 227 (7th Cir. 1983), App. 56, and by offering as gifts the testimony of its lawyers, IBT escaped prosecution on felony charges. Protection thus was secured against the many ramifications, civil and criminal, that could have followed a guilty verdict against the corporation.

The decision below has the potential also of major and undesirable effects upon the bar and the public, particularly in light of the proliferation of grand jury investigations of business conduct. Having read *United States v. Keplinger*, a conscientious prosecutor, presented with evidence or claims of a business crime, doubtless would learn that lawyers participated in the process by which allegedly false reports were submitted to the government, fraud

was committed in the context of business dealings, taxes were evaded, and so on. If criminal charges were contemplated, the prosecutor could hope for no better impact on a jury's assessment of his theories than to present a lawyer-witness aligned against a client or a co-target.

The conscientious prosecutor then would follow a course similar to the one here. He or she would select and contact an involved lawyer, explain that work in which the lawyer participated is regarded as false or fraudulent and that criminal charges are likely. The lawyer, as a participant in the process, is a possible defendant. This awkward status, however, can be altered if the lawyer is willing to act as a government witness, clothed with immunity.

The lawyer, no less than others in different trades, may be expected to view the prosecutor's suggestion with relief. The prospect of an acquittal down the road, while real, would be balanced against the more certain prospect of economic, personal, and professional ruin. The lawyer, of course, will not be welcomed into the fold unless he or she has something to say. Thus, however free of wrongdoing, the lawyer may decide that it is possible to testify to a subjective belief that the client or a target represented by another lawyer was obstructive or less than candid. It would also be normal, particularly if the lawyer spent several thousand hours with the client or co-targets, that someone made angry, pessimistic, or otherwise damaging statements.

Such information can be viewed as lacking substance (being "harmless") in the cauldron of a disputed, complex trial that extends more than six months: After all, as was true of the testimony of Thompson and Current, the hypothetical information does not establish guilt.

But that is not the point of enlisting the lawyer's testimony. The lawyer is called for the same reason as an advocate would call the Trial Judge if that were possi-

ble: The jury must be impressed unduly by the testimony of a professional person, particularly one who worked intimately with the defendants, then turned against them. Thus, in the instant case, the Trial Judge characterized Merrill Thompson as a relatively critical witness, Tr. 11180, and, after the trial, jurors said that their decision to convict the defendants "turned on" the testimony of Thompson. R. 488. Consistently, the jury acquitted as to the alleged falsities in the Nemacur and Sencor studies (about which Thompson did not testify) and convicted as to the studies about which he testified.

B.

The second reason advanced by the Seventh Circuit, that the attorneys properly testified because of the "trial court's finding that the communications made by the defendants were not in confidence," App. 37, is clearly erroneous. *See, e.g., United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The District Court's pretrial findings were directed solely to the question whether formal attorney-client relationships existed between the defendants and the lawyers. App. 48. Judge Nordberg did not rule on the joint defense doctrine, and heard no evidence as to the nature of the challenged communications, undoubtedly because a prosecutor explained at the hearing that the government did not know what the substantive testimony of Thompson and Current would be, preferring to await the Trial Court's decision whether such questioning of the lawyers would infringe attorney-client relationships. Tr. 8-10.

Hence there was no basis for either court's conclusion that the defendants did not intend that their conversations be protected. Not only did Judge Nordberg refrain from ruling on questions regarding the joint defense doc-

trine; there was no testimony or argument at the hearing about confidentiality. And nothing in the record otherwise supports the contention that the unrepresented defendants intended that their chance remarks (those of no value in preparing responses to the FDA, but valuable to the government in a trial setting) should be repeated by the attorneys for IBT.

The issue of disclosure of attorney-client confidences certainly is not settled by the fact, present here, that the clients knew that responses were to be prepared for the FDA. The fact that clients or co-targets understand that some communications will occur is irrelevant to the considerations that underlie the joint defense doctrine and the attorney-client privilege. The proper standard is that confidentiality should attach to whatever the "declarant" understands need not or will not be communicated formally. Chief Judge Urbom perhaps best expressed the principle in *United States v. Schlegel*, 313 F. Supp. 177, 179 (D. Neb. 1970):

> [T]he client intends that only as much of the information will be conveyed to the government as the attorney concludes should be, and ultimately, is sent to the government. In short, whatever is finally sent to the government is what matches the client's intent. The fact that the client has relinquished to his attorney the making of the decision of what needs to be included within the tax return should not enlarge his intent or decrease the scope of the privilege. A different rule would not really support the purpose of the privilege, which is to encourage free disclosure of information by the client to the attorney. If the client, not knowing what the attorney would advise be sent or would choose to send to the government, were to think that all information given to his attorney would lose its confidential status by the act of delivery to his attorney, the tendency would be to withhold information which he, without advice of counsel, would suppose was detrimental to

> him, the client. Thus the attorney, the very one professionally capable of evaluating information, could be of no help in evaluating it, because it would not receive it.

When the joint defense issue again was raised at the trial, the Trial Judge was in no better position to assess the proposed testimony of the lawyers than he had been during the pretrial hearing. The prosecution had not prepared the standard reports of interview from which the court and counsel might have learned what the testimony would be. Tr. 11134-37. Indeed, the Trial Judge observed that the prosecutors did not know what Merrill Thompson would say under questioning. Tr. 11237; *see id.* at 11180, 11401. Instead, in determining whether to permit the proposed testimony, Judge Nordberg relied on prosecutors' inaccurate representations that the testimony would not include "confession-type" statements or those which would otherwise implicate the defendants, App. 60, and that Thompson's testimony would establish that the defendants had lied to him in their efforts to cover up prior misdeeds. App. 69. The prosecutor also said that only IBT was under investigation, not its officers. App. 68.

The prosecution also represented that "most" of the communications which the lawyers would relate were made in the presence of "large groups," so that no confidentiality would attach. App. 65. (Actually, the communications that the lawyers divulged were made exclusively in the presence of other defendants, alleged unindicted coconspirators, lawyers, or others engaged in joint defense efforts. *See* App. 86-90; pp. 10-11 *supra*. A prosecutor also asserted inaccurately that the communications would be those which were intended to be revealed to the government, rather than those which obviously the defendants would not have intended to make public. App. 65.

The Court asked the prosecutors whether any of the proposed testimony would be unfairly prejudicial, and was assured no such testimony would be offered. App. 65, 78.

With this misinformation the Court ruled that since the government *alleged* the testimony would not disclose confidences, and concerned "an alleged cover-up," there was no joint or common defense and *McPartlin* did not apply. The Court cautioned the government, however, not to offer testimony which merely besmirched the defendants. App. 82-85. This cautionary note, it seems clear, reflected the Trial Judge's awareness that the defendants had not intended each of their statements to be non-confidential.

The lawyers' testimony proved to be something quite different than had been warranted. Mud-slinging is as good a description as any, as we have seen. Pp. 10-11 *supra*; App. 86-90.

The testimony, in short, was designed successfully to paint unfavorable pictures of the defendants by suggesting the witnesses thought them deceitful or guilty, and to inject irrelevant, inadmissible, or senseless issues into the case. No lies were revealed, no cover-up. Instead, a hash was made of the joint defense doctrine and convictions predictably followed.

II.

THE WRIT SHOULD BE GRANTED BECAUSE THE ATTORNEYS' TESTIMONY VIOLATED THEIR FIDUCIARY DUTIES AND THE IMPLIED ATTORNEY-CLIENT RELATIONSHIPS WHICH EXISTED BETWEEN THEM AND THE PETITIONERS.[6]

The decision below ignores the importance this Court has attached to the attorney-client privilege, *e.g.*, *Upjohn*

[6] In view of the evidence, adopted by the court below, that Thompson told the Petitioner Plank that he was not Plank's

(Footnote continued on following page)

Co. v. United States, 449 U.S. 383, 389 (1981), and to the fact that it is rooted in "the imperative need for confidence and trust." *Trammel v. United States*, 445 U.S. 48, 51 (1980). If permitted to stand, the decision is likely to fuel further efforts to undermine the privilege and the confidence of the public in the bar. For these reasons, and because the decision below conflicts with *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978), and the decisions of the Second and Fifth Circuits on which it relies, *see* 580 F.2d at 1319, the writ should be granted.

The Petitioners never specifically asked for legal services from the lawyers. But that is not the issue. Neither did the defendants in *Westinghouse* request legal advice. Nevertheless their communications with the lawyers were privileged because they *reasonably* believed they were receiving personal advice and did receive it. And that is the case here, where the attorneys Thompson and Current repeatedly functioned as the Petitioners' advisors without advising them IBT purportedly was the sole client. The lawyers' actions and silence thus created "an implied relation . . . or at least . . . a fiduciary obligation to the [Petitioners]." 580 F.2d 1319.

In *Westinghouse* a district court held that a law firm need not be disqualified from representing Westinghouse in a suit against companies which belonged to an association the firm also represented. The court found that no

---

[6] *continued*
lawyer, p. 5 *supra*, we do not argue here that an attorney-client relationship existed between the two. Still, Plank regarded Current as his lawyer, and Current conceded Plank could have assumed he was receiving personal legal advice. *Id.* In addition, Plank was the victim of spillover prejudice from the presence and testimony of both attorneys. Hence, we contend, Plank as well as Keplinger qualify as aggrieved Petitioners in regard to their attorney-client claims.

attorney-client relationship existed between the firm and the defendants because, in part, the latter had not contracted for the law firm's services, did not pay it fees, and there was no indicia of an implied relationship such as an attorney's appearance at a proceeding. *Id.* at 1313-18. Rejecting this conclusion as too narrow, and ordering the disqualification of the law firm, the Court of Appeals explained: "A fiduciary relationship may result because of the nature of the work performed and the circumstances under which confidential information is divulged. . . ." *Id.* at 1320. The court also quoted and adopted the 1972 version of Rule 503(a)(1), Fed. R. Evid:[7] "A 'client' is a person, . . . who is rendered professional legal services by a lawyer, . . ." The court also found it was reasonable for Westinghouse's adversaries to believe the information they submitted to the law firm was confidential. 580 F.2d at 1321.

In *Westinghouse* no oil company representative asked Kirkland & Ellis to act as its attorney or told the law firm he wanted personal legal representation ("manifested [an] intention to seek professional advice," App. 35). 580 F.2d at 1317. Those facts, however, did not control because Kirkland lawyers solicited confidences from individuals and "did not disavow [their] capacity as attorneys but came expressly represented as lawyers." *Id.*

---

[7] Addressing an attorney-client privilege claim, Judge Joiner wrote: "What more accurate expression of the principles of the common law and of the application of reason and experience could exist than a draft that was developed by a representative committee of bench, bar and scholars, twice published and commented on by the bench and bar, adopted by the Judicial Conference and finally forwarded by the Supreme Court to Congress for promulgation." *In re Grand Jury Proceedings* (*Jackier*), 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978). Accord, J. Waltz, The New Federal Rules of Evidence 47 (2d ed. 1975).

Similarly, the attorney-client relationship is not destroyed because of one party's knowledge that counsel also represents another. *Id.* at 1321. The lawyer must tell clients about actual or potential conflicts of interest. It is not the clients' duty to divine them. *Id.* In this and other respects, the Seventh Circuit embraced the standards enunciated in *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969), that the existence of an attorney-client relationship may be implied from the conduct of the parties and the putative client's good faith beliefs.

Here the defendants reasonably expected their communications would not be divulged. P. 5 *supra.* They believed they were represented personally because the President of IBT so instructed them in light of his previous contacts with the lawyers. *Id.* (Such instructions, coming from IBT's President, surely excuse the formalistic failure of the Petitioners to *ask* for legal representation from Thompson. Because the Trial Judge made no findings about the credibility of Dr. Calandra or the Petitioners, their uncontradicted testimony must be accepted.) The attorneys never advised the Petitioners that IBT was the sole client, and counseled them for many months. *Id.* at 5-8.

As significant as the bases for the defendants' beliefs they were represented personally, the lawyers actually provided personal legal representation and advice on numerous occasions. Pp. 5-7 *supra.* Their general denials, *see* p. 9 *supra*, thus ring hollow.

The court below distinguished *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969), which *Westinghouse* cited with approval. 580 F.2d 1317 n.6; App. 35 n.14. However, the two factors perceived to take the instant case outside the *Hutton* holding do not support the court's position. First, the court noted that Merrill Thomp-

son did not file a formal appearance at the FDA meeting at which he appeared with a defendant. But appearances are not filed at "meetings."[8] The court also stated that, unlike *Hutton*, the "client" at the FDA meeting did not identify Thompson as his lawyer. *Id.* To the contrary, asked if he minded if the proceedings were recorded, Dr. Calandra (not Keplinger, as the Opinion states) said that procedure was acceptable, though "my lawyers will probably kick me in the teeth." Tr. 258-59. Thompson did not challenge this characterization of his role or respond when an FDA representative repeatedly referred to him as Calandra's lawyer. *See* p. 6 *supra*. Therefore, *Hutton* is indistinguishable.

The court below adopted the Trial Court's ruling that as the Petitioner's subjective beliefs about personal legal representation were not minimally reasonable, and they had not expressed to the lawyers their beliefs, no privilege arose. App. 36. For the reasons described above, p. 24, the ruling was clearly erroneous. *In re Grand Jury Proceedings* (*Jackier*), 434 F. Supp. 648, 650 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978), also is cited by the Seventh Circuit in support of its view. *Jackier* is not our case, however, because the employee who sought to quash a subpoena served on the lawyer "consulted Jackier in his capacity as attorney to Arnolds, Inc." 434 F. Supp. at 650. The Petitioner Keplinger, on the other hand, was told by Calandra that Thompson's role was not limited to the representation of IBT.

---

[8] In any event, an appearance has no significance in determining the existence of an attorney-client relationship. It is the lawyer's presence and participation that creats the presumption of an attorney-client relationship between him and the person he accompanies. *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 387 (S.D. Tex. 1969).

The Seventh Circuit also stated that claims of privilege should have been made as each question was put to the lawyers. App. 34 n.13. Since no one knew what the attorneys would say, *see* p. 20 *supra*, such a procedure would have been cumbersome at the least. In any event, the Trial Judge understood that the defendants objected to the very presence of the lawyers on the witness stand, so that specific objections were unnecessary. Thus he granted a standing objection to the attorneys' testimony. Tr. 11235-36.

III.

THE WRIT SHOULD BE GRANTED BECAUSE THE CONVICTION OF THE PETITIONER KEPLINGER AS TO THE NAPROSYN STUDY VIOLATED THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

We recognize this Court seldom exercises its discretionary power to hear and reverse convictions because of insufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979). Nor do we suggest that the Court's resources should be applied often in this class of case.

The facts recited above, though, pp. 12-13, are truly exceptional. The Petitioner Keplinger underwent a six-month trial that was preceded by seven years of investigation and preparation. That no probative evidence was adduced to link him with the Naprosyn study violations[9] is a miscarriage which only this Court can right.

---

[9] While the Court of Appeals did not specify what "other" evidence (App. 15) might support Dr. Keplinger's conviction, presumably the arguments made in the prosecution's Brief were accepted. None satisfies, though.

The prosecution claimed that Dr. Keplinger "essentially admitted" on cross-examination that he did not look for the missing data. Gov. Br. 59. But he did not, as the transcript makes clear:

(Footnote continued on following page)

[9] *continued*

Q. And if you had been told by 2 of the scientists at IBT that they suspected that there might be a falsification of data in a report, you'd investigate that, wouldn't you?

A. When you start your question with "if", I would have to say yes, I would investigate it.

Q. And you'd go to Mr. Greco, the head of the clinical chemistry lab, and ask him about it?

A. Not necessarily. I would have asked someone. I think I also would have asked why the information was needed at that point.

MR. LASSAR: Your Honor, may this be stricken? I asked him if he'd ask Ron Greco.

THE COURT: All right, I will strike the answer as not responsive and you may proceed. The jury will disregard it.

MR. LASSAR: Thank you.

BY MR. LASSAR:

Q. Did you ask Mr. Greco about the blood and urine data in the naprosyn study, Dr. Keplinger?

A. Well, I testified yesterday that I didn't remember the meeting, I didn't remember anybody talking to me about it, so of course I wouldn't have asked Mr. Greco about something I don't even remember. (Tr. 14902-03.)

The prosecution also wrote: "Keplinger was reminded of the missing data by Phil Smith at the Audit Committee meeting in April, 1976. (Tr. 3728)." Gov. Br. 59. Actually, while Smith said at that meeting that he was aware of falsified data, he did not identify the study to which he referred. Tr. 3729. Putting aside the clumsy implication of the word "reminded", the point is silly. The fact that an employee talks of unspecified falsified data tells us nothing about the knowledge or acts of Dr. Keplinger four years earlier. More probative is the fact that when the FDA requested the blood and urine data in 1976, Dr. Keplinger participated in a Saturday search for it and found the urine data for the first 15 months of the study. Tr. 14713. As he pointed out, if he believed that the data did not exist, he would not have made such a search. Tr. 14714. Moreover, in March of 1977, eight months into his work, Merrill Thompson said there was no reason to believe that there was fabricated data in the Naprosyn reports. Tr. 318-20.

The prosecution incorrectly stated that "Keplinger was in charge of day-to-day activities in the lab while Naprosyn was being studied." Gov. Br. 60. He was the Manager of Toxicology; he had

(Footnote continued on following page)

CONCLUSION

For each of the foregoing reasons, the Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit to resolve the questions presented herein.

Respectfully submitted,

THOMAS D. DECKER *
MARY KATHARINE RYAN
RICHARD H. McLEESE
THOMAS D. DECKER
& ASSOCIATES, LTD.
135 S. LaSalle Street, Suite 853
Chicago, Illinois 60603
(312) 263-4180
Counsel for Petitioner Keplinger

HARVEY M. SILETS *
SILETS & MARTIN
140 S. Dearborn Street, Suite 1510
Chicago, Illinois 60603
(312) 263-5800
Counsel for Petitioner Plank

May 13, 1986

* Counsel of Record

---

[9] *continued*
no direct knowledge of the work being performed in the clinical chemistry laboratory. Tr. 14904.

The prosecution also stated that Dr. Keplinger participated in revisions to the Naprosyn report, had a draft of the original report in 1972, and participated in meetings in 1976 regarding a submission to the FDA about the study. Gov. Br. 60. All this is true, but not evidence of the Petitioner's guilt because the documents and meetings did not disclose wrongdoing.